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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

SWEDENBORG and AMELIA PABLO,
Petitioners,

v.

ALBERTO R. GONZALES, as
Attorney General of the United States,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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BACKGROUND

Finding the Pablos' motion untimely, the BIA told them to get DHS Counsel to join the motion. DHS Counsel demanded the undelivered envelope as proof the Pablos did not receive the BIA decision. The BIA denied Pablos' motion for failure to depart voluntarily, an order also in the undelivered envelope. The Seventh Circuit affirmed, holding the Pablos to have assumed risk of any errors of their counsel as civil litigants, and failure to file a bar complaint against counsel who gave their address to the BIA when he withdrew 17 months before the BIA's decision.

QUESTION PRESENTED

1. Is the Seventh Circuit's decision a violation of the *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), rule against *post hoc* rationalizations, and does that decision thwart congressional intent in 8 U.S.C. §§ 1153(b)(3) & 1255(i)? The unexplained BIA switch from requiring DHS Counsel to join the Pablos' motion as condition to reopen, to denying the motion because the Pablos had failed to leave voluntarily did not faze the court below, which added that the Pablos' prior counsel was derelict, relying only on word that he had been suspended, without reason given, and arguing that the Pablos should have complained to the bar about that counsel.

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OPINIONS BELOW

The Seventh Circuit Court of Appeals' opinion is unpublished. *See Pablo v. Gonzales,* No. 04-1070, 2006 U.S. App. LEXIS 18618, * (7th Cir. Jul. 21 2006), *reh'g denied,* 2006 US App. LEXIS 24483 (7th Cir. Oct. 22, 2006) The slip opinion is reproduced in Appendix at 1-4. The Seventh Circuit denied panel rehearing. The Board of Immigration Appeals denied reopening by certification to itself, or *sua sponte,* after having suggested that the Pablos seek joinder by Counsel for the Department of Homeland Security in order to qualify for reopening under a limited exception. All three BIA decisions are reproduced in the Appendix at.

JURISDICTION

The Seventh Circuit filed its decision on July 21, 2006. On September 5, 2006, the Pablos timely petitioned for panel rehearing. The Seventh Circuit entered its decision denying panel rehearing on September 22, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Seventh Circuit's decision on writ of *certiorari.*

STATUTES AND REGULATIONS INVOLVED

8 U.S.C. § 1153(b)(3)

(A) In general. - Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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8 U.S.C. § 1229a(c)(7)

(A) In general.-An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents.-The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline.- (i) In general.-Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

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8 U.S.C. § 1255

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

***

(i)(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States-- (A) who--(i) entered the United States without inspection; (B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of-- ...(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and (C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application...

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8 C.F.R. § 1003.2(c)

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the

Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

STATEMENT OF THE CASE

The Pablos seek a writ of *certiorari* for review of the Seventh Circuit's affirmance of the Board of Immigration Appeal's ("BIA") denial of their motion to reopen. When the BIA dismissed the Pablos' appeal of the Immigration Judge's ("IJ") decision denying them asylum and withholding of deportation and withholding of deportation under the United Nations Convention Against Torture ("CAT"), the Pablos had been appearing before the BIA *pro se* for 17 months.

The Pablos became *pro se* when the Illinois Supreme Court Attorney Registration and Disciplinary Commission ("ARDC") suspended their counsel, Alexander C. Vrbanoff, from the practice of law for one year, and concurrently placed him on probation for five.

The ARDC suspended Attorney Vrbanoff for misconduct unrelated to his immigration law practice or the Pablos' case. The reason for the suspension, contrary to the Seventh Circuit's conclusion, was not dereliction of duty.

The report of the ARDC's Hearing Board, available to the general public and of which the Seventh Circuit is permitted to take judicial notice, *see, e.g., Nwaokolo v. INS,* 314 F.3d 303, 308(7th Cir. 2002), is posted at the ARDC's Internet website.

That report shows that Attorney Vrbanoff's misconduct constituted association with Charles Rojek, who lost his license to practice law in 1989 for failure to register. Unaware that Rojek had lost his license, Attorney Vrbanoff entered an agreement with him to split fees on client referrals by Rojek. The ARDC investigation concluded that Attorney Vrbanoff's involvement had injured no client but had, nevertheless compromised the profession. *In re Alexander C. Vrbanoff,* 98 CH 125 – Report and Recommendation of the Hearing Board (December 6, 2000), *available at* http://www.iardc.org/rd_database/disc_decisions_detail.asp (last accessed 10/31/2006).

The Hearing Board specifically adopted a psychiatric expert's testimony and recommendations that Attorney Vrbanoff's misconduct was mitigated by his having twin addictions to alcohol and drugs, caused by a bi-polar psychiatric disorder and depression. *See Id.*

When the ARDC suspended Attorney Vrbanoff from the practice of law, ordering him to comply with a regimen of psychiatric medications, psychotherapy and Alcoholics Anonymous meetings, Attorney Vrbanoff complied and, on top of that, turned over all of his client files to the ARDC.

During that same period, Attorney Vrbanoff requested the BIA, under BIA rule, for leave to withdraw from clients' matters before that Board. The Board, in turn, requested that Attorney Vrbanoff provide it with addresses for those clients, and Vrbanoff did.

Unfortunately, the address Attorney Vrbanoff provided to the Board for the Pablos in July, 2001, would turn out on December 4, 2002, to be incorrect because the Pablos had moved.

When the Board sent its December 4, 2002, decision dismissing the Pablos' appeal, which the Board sent to the address the Board had on record, the Pablos did not receive that decision, and the decision was apparently returned to the Board. This point is contended by the Justice Department, which argues that pages 150 and 151 are not conclusive evidence of the fact, as the Pablos argue, that the decision copy intended for the Pablos found its way back to the BIA.

The Pablos argued, and still do, that what appears at pages 149 of the official administrative record the Agency filed in the Seventh Circuit in their case is a copy of the Board's December 4, 2002, decision as it looked when the Board issued and mailed that decision.

The Pablos argued that next to the copy of the decision, however, at page 150, is a copy of the returned envelope, which appears to be a #10 business envelope with the Board's Falls Church, Virginia return address in the left upper-most corner, and two postmarks in the right upper-most corner. An icon of a hand and its pointing finger (with "return to sender") and the handwritten abbreviation "ANK" also appear next to "12/9" also in handwriting.

The Pablos further argued that "ANK" means "Address Not Known," and that 12/9 is approximately the date one would expect an item mailed First Class by U.S. Mail to go from Falls Church, Virginia, to a Chicago, Illinois, suburb.

The postmarks show a postage meter stamp with a December 3, 2002 date, which appears to be the BIA's own meter stamp, was applied to the surface, and a second, superimposed above the first, whose date is illegible, which appears to be the Falls Church, VA, U.S. Postal Service's postmark. *See* Appendix at 20.

What appears at page 151 of the official administrative record begs the question. That is, if page 150 of the administrative record is not the undelivered and returned envelope with the BIA's decision, as is contended by the Justice Department and the Seventh Circuit, page 151 of the administrative record, another copy of the BIA's December 4, 2002, decision, is redundant. It is a true mystery, that it no explanation is given for its existence in that very spot, nor an explanation for page 150 behind it.

The Justice Department proffered no reason for that additional copy of the Board's decision, in light of the copy at page 149, nor does the Justice Department explain what page 150 is a copy of if not of the envelope bearing the BIA's decision intended for the Pablos but not delivered to them.

In an effort to resolve this contest, the Pablos moved the Seventh Circuit for an opportunity to inspect the original from which the record copy filed with the court was reproduced, but the Seventh Circuit denied that motion.

At any rate, after Attorney Vrbanoff had been re-instated to his practice of law in mid-2002, Swedenborg Pablo's employer's immigrant visa petition made under 8 U.S.C. § 1153(b)(3), in the skilled-worker category, (I-140), was approved in the spring of 2003.

Approval of the I-140 made the Pablos immediately eligible to apply for adjustment of status (green card), because the labor certification application that started that process had been filed prior to the sunset of 8 U.S.C. § 1255(i), which permits even those present after illegally entering the country to adjust their status to that of green card without having to leave the country.

That section imposes a $1,000.00 penalty in exchange for waiving the non-citizen's illegal entry or presence, which would have rendered the Pablos ineligible for adjustment of status under 8 U.S.C. § 1255(a).

One circuit of the Court of Appeals has tracked congressional intent in § 1255 and concluded that Congress

enacted that section to (1) alleviate the burden on non-citizens and their American families, having to leave and process overseas, (2) alleviate the long lines at our consulates and embassies not designed and meant to handle the high volume of non-citizens coming from this country to process for visas overseas, and (3) to alleviate the burden on Congress itself in the mounting volume of private bills for the benefit of individuals wishing to avoid the trip overseas. *See Succar v. Ashcroft*, 394 F.3d 8, 22 (1st Cir. 2005); *accord Randall v. Meese*, 854 F.2d 472, 473-74 (D.C. Cir. 1988).

So, with Attorney Vrbanoff back in practice, and armed with an approved I-140 immigrant worker visa petition and proof of § 1255(i) eligibility, the Pablos filed their motion to reopen with the BIA on March 27, 2003.

The Board deemed the Pablos' motion untimely under 8 C.F.R. § 1003.2(c)(2), because 90 days from December 4, 2002, was March 4, 2003, but saw the equities present in the Pablos' case and crafted an equitable resolution. The Board deemed the Pablos qualified for the exception to the time and number limits and stated in its decision denying the March 27, 2003, motion, in relevant part,

> "The rules, however, do provide for limited exceptions to these time and number limitations, among which is a motion to reopen filed jointly by the alien and the Service counsel in the case. Consequently, in order for the respondent to obtain reopening of these proceedings, he

should contact the Service and seek its agreement to join a motion to reopen."

05/05/2003 BIA Decision, Appendix at 14-15.

Attorney Vrbanoff contacted the Chicago office of the DHS Counsel. But that Counsel declined to join the Pablos' motion arguing:

"The Board [] granted your clients voluntary departure. Failure to depart renders your clients statutorily ineligible for certain forms of relief including adjustment of status. I understand you assert that your clients did not receive the decisions. However, absent evidence that your clients did not receive the decision by the Board [] (no less than the returned envelope) I must assume the decisions were delivered."

06/23/2003 W. Douglas Craig, Deputy District Counsel letter, Appendix at 19.

When the Board issued its December 11, 2003, decision, the Board was silent on its earlier solution to the Pablos' untimely motion, by requiring DHS Counsel's joinder in the Pablos' motion and, instead, jumped on DHS Counsel's argument regarding the voluntary departure bar.

The Pablos appealed to the Seventh Circuit, but that court held that the Pablos deserved what they got because they were civil litigants. The Seventh Circuit held Attorney Vrbanoff derelict in sending the BIA an incorrect address, noting, for support for its position that Vrbanoff was derelict,

that Vrbanoff had been derelict before because the Illinois ARDC had suspended him from the practice of law.

The Seventh Circuit's decision points to nothing as the basis for its conclusion that the ARDC's suspension of Attorney Vrbanoff was for dereliction of duty. Nothing in this record explains why the ARDC suspended Vrbanoff. But the ARDC does, at its Internet website open to the public, of which the Seventh Circuit failed to take judicial notice, giving rise to this petition for writ of *certiorari*, among other reasons.

REASONS FOR GRANTING PETITION

I. The United States Supreme Court should grant a writ of *certiorari* because the Seventh Circuit's decision relies on impermissible *post hoc* rationalizations conflicting with *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The Seventh Circuit's decision ignores the potential harm of deportation, especially after the Pablos' voicing of fear of persecution in the Philippines, and effectively thwarts congressional intent in 8 U.S.C. § 1153(b)(3), making labor visas available to enable U.S. employers in need of skilled workers and professionals like Swedenborg Pablo to hire them, if those skilled workers and professionals are eligible for adjustment of status under 8 U.S.C. § 1255(i), under which Congress has expressly

waived their illegal entry and presence in favor of the benefit accruing in terms of their skill.

The Supreme Court has held that when persons have voiced fear of persecution in their homelands, courts should take great care before sending them back to those countries. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 455 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.").

The Pablos have had a trip fitting the title Homeric Odyssey. They retained Attorney Vrbanoff after Avalino Halagao, a Virginia lawyer, defrauded them and the Immigration Court by perpetrating a scam about H-4 visas. Halagao then pushed the Pablos to accept voluntary departure and forfeit their right to apply for relief from deportation, including asylum and withholding of deportation, promising that he could get them the H-4 visas without them leaving the country.

It is noteworthy that H-4 is a category for dependents of H-1B visa holders, both non-immigrants who can only be processed stateside while in some other non-immigrant status. Otherwise, anyone wishing an H-4 must, first, get an H-1B principal as a relative, and then be in status or be at an

overseas American consulate or embassy. *See, e.g.,* 8 U.S.C. § 1101(a)(15)(H).

Attorney Vrbanoff took over and presented the Pablos' ineffective-assistance-of-counsel claim to the IJ who granted the Pablos reopening. In the end, the IJ heard but denied the Pablos' asylum application because the IJ deduced that although Swedenborg Pablo may have been persecuted in the Philippines, his return there from sanctuary in the Middle East, after hearing that police had stopped looking for him, had rebutted the presumption of a well-founded fear of future persecution upon proving past persecution. The Pablos appealed to the BIA.

In the meantime, however, Swedenborg Pablos' employer, seeking the former's skill as a specialist welder and welder supervisor, petitioned the U.S. Department of Labor to certify a shortage of such skilled workers in the U.S. economy in the geographical zone in which the employer's business is located. The U.S. DOL indulged, culminating in approval of Swedenborg Pablos' I-140 petition.

Believing that their case was still on appeal to the BIA, because they had not received the BIA's December 4, 2002, decision, the Pablos filed their March 27, 2003, motion to reopen with the BIA, asking that he Board remand for a hearing on their green card applications.

Congress's intent is clear, that is that Congress intended that U.S. employers unable to find skilled workers in the specialized categories such as Swedenborg Pablos', be able to

recruit workers like Swedenborg Pablo as immigrant workers with permanent work visas, if those workers are eligible for adjustment of status. *See* 8 U.S.C. § 1153(b)(3).

That intent is made clearer by Congress's broadening of the class of non-citizen's eligible for adjustment of status under 8 U.S.C. § 1255, when Congress enacted sub-section 1255(i) permitting classes of non-citizens ineligible for adjustment of status to pay a penalty and adjust status to avoid the burden of overseas processing for green cards. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 103-317, 108 Stat. 1724 (Aug. 26, 1994). *See also* Legal Immigration and Family Equity Act, Pub. L. No. 106-554, 114 Stat. 2763 (Dec. 21, 2000).

It, therefore, thwart's clear congressional intent to deny the Pablos adjustment of status when they have approved visa petitions that make them immediately eligible for green cards, and when the Pablos are clearly eligible for adjustment of status, citing a technicality such as that the Pablos failed to depart under a grant of voluntary departure and, therefore, that they are barred from adjustment of status.

To suggest, as did the Seventh Circuit, that the Pablos' claim that what appears in the administrative record at page 150 is a copy of the envelope returned to the BIA as undeliverable, is not conclusive, is ridiculous. It is especially so because neither the Seventh Circuit, nor the Justice

Department, which first proposed that argument, explains what page 150 of the administrative record is a copy of.

After the Seventh Circuit denied the Pablos' motion for an opportunity to review the original, the party with custody of the evidence, the Agency, should produce and explain what it is. That has been the Agency's rule for almost 30 years. *See, e.g., Matter of Vivas*, 16 I. & N. Dec. 68 (BIA 1977).

It is patently unfair to punish the Pablos, even for what the Seventh Circuit held to be their assumption of risk in choice of attorney, as civil litigants. What the Seventh Circuit says is Attorney Vrbanoff's dereliction of duty is nothing more than a simple error, at most what most to which most responsible humans would be prone.

That is, Attorney Vrbanoff, under pressure and depression of having been suspended from his practice, and suffering the effects of his bi-polar psychiatric disorder, a serious ailment, opened a file and sent the BIA the first address that he saw.

It is tempting to think that the Seventh Circuit minimized Vrbanoff's predicament. However, that would assume that the Seventh Circuit even considered the actual facts of Attorney Vrbanoff's circumstances, which makes its conclusion that the Pablos must suffer the consequences of their choice of Vrbanoff as their attorney at least somewhat troubling.

The Seventh Circuit's opinion goes from noting Attorney Vrbanoff's ARDC suspension to concluding that the suspension was "evidently" for dereliction of duty.

In a classic syllogism, the court concludes that if the ARDC suspended Attorney Vrbanoff, he must have been derelict. If Attorney Vrbanoff was derelict in one case, he must be derelict in all other cases, explaining the cause of his sending the wrong address for the Pablos to the BIA in July, 2001.

It is not only the court's failure to rely on actual facts in the record that hikes the stakes in the Pablos' case. The court's decision's choice of words is potentially inflammatory.

Use of the word "evidently," which, by itself, means "according to the evidence available," *American Heritage® Dictionary of the English Language* (4th ed. Houghton Mifflin 2004), *available at* http://dictionary.reference.com/browse/evidently (last accessed October 31, 2006), persuades the reader that the accompanying charge has a factual basis in the record when, in fact, it does not.

The juxtaposition of "evidently" with the charge of dereliction makes the charge almost insidious, albeit assuming a position clearly without invidious intent.

Attorney Vrbanoff, among a small group that practice immigration law, is not invisible by any stretch of the meaning of that word. A charge of dereliction leveled against him is sure to play widely and gets a reception with few, if any, questions about its accuracy.

Self-esteem is one thing. A means to a livelihood is another, and Attorney Vrbanoff has no appellate recourse because monetary sanctions were not levied by the Seventh Circuit. *See, e.g., Clarke Equip. Co., v. Lift Parts Mfg. Co.*, 972 F.2d 817, 810 (7th Cir. 1992), *citing Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984).

But even assuming that Attorney Vrbanoff's self-esteem and reputation are not important considerations, there are two human beings whose lives are in jeopardy. They face banishment because the Agency prefers a technicality over its sensible election, in the beginning, that it reopen in exercise of its discretion with both parties joining in a motion to that effect.

At oral arguments in the Pablos' case, the Panel explored the issue of ineffective assistance of counsel and the panel members were told that no clear facts supported filing an ineffective-assistance claim because Attorney Vrbanoff was assisted, after suspension, by a couple of colleagues, either of which could have prepared the response to the BIA's request for addresses for Vrbanoff's signature. *See* Audio Recording of Oral Argument, *Pablo v. Gonzales*, 04-1070, *available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-1070&submit=showdkt&yr=04&num=1070 (last accessed 10/31/2006).

That aside, Seventh Circuit misread the BIA's rule on ineffective-assistance-of-counsel claims in two ways. First, the Seventh Circuit assumed, without warrant—because the

record does not give a reason for Attorney Vrbanoff's ARDC suspension—that the Pablos had been saddled with derelict counsel, and that the Pablos had an ineffective-assistance claim against Attorney Vrbanoff. *See Pablo,* 2006 U.S. App. LEXIS 18618, at *7–8, *citing Matter of Lozada,* 19 I. & N. Dec. 637 (BIA 1988).

Second, the Seventh Circuit misread *Lozada's* third prong, requiring a bar complaint, to be perfunctory. That a bar complaint is a *sine qua non* for a non-citizen seeking relief after error or mistake by counsel. As one court has held, there

> "are inherent dangers...in applying a strict, formulaic interpretation of *Lozada*. In particular, [courts should be] concerned that courts could apply *Lozada's* third prong so strictly that it would effectively require all petitioners claiming ineffective assistance to file a bar complaint. Lozada explicitly allows petitioners to provide a reasonable explanation for not filing a complaint."

Lu v. Ashcroft, 259 F.3d 127, 2001 U.S. App. LEXIS 16591, *15 (3rd Cir. 2001), *citing Matter of Rivera,* 21 I. & N. Dec. 599 (BIA 1996).

A *Lozada* complaint "is not an absolute requirement ...and...failure to file [such] a complaint is not fatal if a petitioner provides a reasonable explanation for his or her decision." *Id.,* at *17; *accord Lo v. Ashcroft,* 341F.3d 934 (9th Cir. 2003); *Rodriguez-Lariz v. INS,* 282 F.3d 1218 (9th Cir. 2002).

A good explanation suffices in the place of a bar complaint. *See Stroe v. INS*, 256 F.3d 498, 2001 U.S. App. LEXIS, *23 (7th Cir. 2001) (Diane P. Wood, J., *concurring*). The fact that the BIA has added actual prejudice to the non-citizen's burden under *Lozada*, *see Matter of Assaad*, 23 I. & N. Dec. 553 (BIA 2003), shows that the doctrine is neither static nor its prongs perfunctory.

II. The Supreme Court should reverse the Seventh Circuit's decision because that court affirmed a decision in which the BIA abused its discretion by abruptly switching from a position in which the BIA promised to reopen the Pablos' case if the Pablos asked the DHS Counsel to join their motion, to a position in which the BIA denied the motion by ignoring the DHS Counsel's demand that the Pablos produce the envelope they never received, and adopting another of the DHS Counsel's unreasonable positions based on a technicality barring the Pablos from relief, supposedly because the Pablos failed to depart voluntarily upon the BIA's grant of voluntary departure after dismissing their appeal, which ignores the simple logic and common sense that the Pablos can no more produce an envelope they never received than depart by order contained in that envelope.

The Seventh Circuit not only relied on a reason the Agency did not voice in sending the Pablos away, violating the rule in *Chenery Corp.*, 332 U.S. 194, by chastising the Pablos for not complaining against Attorney Vrbanoff, the Seventh Circuit endorsed another *post hoc* rationalization by DHS counsel that the Pablos are barred from adjustment of status for failing to depart upon the BIA's grant of 30 additional days of voluntary departure to them in its December 4, 2002, decision.

That claim stretches credulity to its limits because the grant of voluntary departure is in the same envelope the Pablos did not receive. It adds nothing to the argument to point to the Pablos failure to depart because the Pablos argued that they did not know about the December 4, 2002, decision because they never received it, which is where the voluntary departure order was, to argue that the Pablos are ineligible to adjust status anyway. *See* Appendix at 11.

Three years after the fact, it is clearly unfair to pin what is at best human error on the Pablos, especially when there is evidence that Attorney Vrbanoff suffered from serious psychiatric issues at the time he gave the BIA the incorrect address that caused the misadventure of the BIA's decision dated December 4, 2002.

At any rate, the practical result is that two important congressional acts, 8 U.S.C. §§ 1153(b)(3) & 1255(i), are trampled underfoot. Those acts express clear congressional intent that Swedenborg Pablo's employer get a skilled

immigrant worker with a permanent work visa; and that the Pablos adjust their status without leaving the country.

The reason given for trampling those two policy objectives underfoot is the dubious argument that non-citizens granted voluntary departure who fail to depart by their departure dates must be barred from relief to discourage abuse of voluntary departure. *See* 8 U.S.C. § 1252b(e)(2) (1994); *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), *aff'd, Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998).

The problem with that argument is that neither the BIA, the Justice Department, nor the Seventh Circuit, has shown how the Pablos could have abused a grant of voluntary departure in a decision they never received and, thus, of which they had no knowledge. In addition, as policy objectives go, protecting voluntary departure cannot possibly begin trumping two policy objectives concerning the ability of U.S. employers to get scarce skilled immigrant workers and professionals like Swedenborg Pablo, who are eligible for adjustment of status, for the good of the U.S. economy.

Moreover, setting the contest of policy objectives aside, the same rule stemming voluntary-departure abuse excepts the non-citizen prevented from departing by exceptional circumstances from the harsh punishment levied against the Pablos. *See Matter of Shaar, supra,* at 546. Congress has defined exceptional circumstances as Circumstances beyond the non-citizen's control. *See* 8 U.S.C. § 1229a(e)(1).

That the Board's decision intended for the Pablos, which is where the order that the Pablos voluntarily depart within 30 days was put, was returned to the BIA undelivered because of an incorrect address is truly beyond the Pablos' control and constitutes exceptional circumstances, which should qualify the Pablos for the exception to the voluntary-departure bar.

It is true, as the Supreme Court has held, that motions to reopen are disfavored because they are subject to abuse, and every delay works to the non-citizen's advantage. *See, e.g., INS v. Doherty*, 502 U.S. 314, 322-323 (1992). However, the danger of abuse of the motion-to-reopen provision, in the Pablos' case, has not been shown to be present.

It is poignant that the BIA itself, in its May 5, 2003, decision voiced no such concern. *See* Appendix at 14-15. The BIA had before it as much evidence as was necessary to make such a determination. Instead, the BIA found the Pablos deserving of its exercise of that limited grace to permit the Pablos to reopen under the exception to the rule limiting the time within which to reopen. The BIA order does not say that the BIA would only reopen if, for instance, the DHS Counsel were having a good day, or if the moon is full. *See Id.* It simply told the Pablos to contact the DHS Counsel and ask that Counsel to join their motion. Appendix at 14-15.

It makes sense to assume that the BIA would wait to see if the DHS Counsel agreed to join the motion, but that is not a condition the BIA interposed in its May 5, 2003, decision. *See*

Appendix at 14-15. Therefore, it is not unreasonable to conclude that the DHS Counsel's refusal to join, especially for as obtuse a reason as that Counsel's requirement that the Pablos prove the negative of not having received the BIA decision in question, by demanding that they hand over the envelope they did not receive, the BIA has the authority to reopen under such circumstances, in the interests of justice.

It is well settled that the Government counsel's duty is not to win in every case no matter the cost, but to uphold the law and justice. *See Reid v. INS,* 949 F.2d 287, 288 (9th Cir. 1991).

The BIA wrongly abandoned a sensible position to Kowtow to the DHS, a party to these proceedings like the Pablos. At the same time, the BIA disingenuously attempted to placate the Pablos by stating that it is sympathetic to their plight. *See* Appendix at 11.

If the BIA were truly sympathetic to the Pablos' plight, the BIA should have explained what compelling reason made it abandon its May 5, 2003, position, which it abandoned without explanation. The Supreme Court has held that such abrupt departure from the agency's announced policy by which it will exercise its discretion makes the discretion subject to review.

> "Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed

> alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, or an abuse of discretion' within the meaning of the Administrative Procedure Act, 5 U. S. C. § 706(2)(A)."

INS v. Yeuh-Shaio Yang, 519 U.S. 26, 32 (1996).

In its May 5, 2003, decision, the BIA cited to its rule under 8 C.F.R. § 1003.2(c)(3), which permits reopening, notwithstanding time and number limitations, if a motion is joint. *See* Appendix at 14-15. Under that exception, the BIA has established that the non-citizen is entitled to reopening in a joint motion with the DHS Counsel.

It is not the parties that had come up with the idea of a joint motion, usually the sequence of events. It is the BIA itself, which proposed the resolution, a significant feature of this case. Throwing its hands in the air, which the BIA did in its December 11, 2003, decision, *see* Appendix at 9, is peculiar.

There is no basis to put one decision above the other. Both are single-member dispositions. Usually, if the Agency is withdrawing an earlier position, that would constitute a rehearing by a panel or the *en banc* Board. It did not happen here. Board Member Edward R. Grant signed the May 5, 2003, decision for the Board. Frederick D. Hess signed the December 11, 2003, decision for the Board.

Neither member, Grant vs. Hess, has any clear advantage over the other in terms of authority that one decision trumps the other. The reasons the DHS Counsel gave for refusing to

join the Pablos' motion are only superficially plausible, if even that.

Demanding an envelope that the Pablos never received is at least a bit obtuse. Insisting that the Pablos violated an order that is contained in the decision in the envelope the Pablos never received is equally obtuse.

As to the Pablos, with respect to the BIA, the DHS has no advantage. The DHS appears before the BIA as a litigant or party similar to the Pablos, which is why the DHS must shoulder a burden of proof before it can carry the day. *See, e.g., Woodby v. INS*, 385 U.S. 276, 286 (1966).

If the BIA Kowtows to the DHS, such defeats the whole congressional intent that the deportation proceedings be an adversarial process. What the BIA, seconded by the Seventh Circuit, has done in the Pablos' case frustrates Congress's intent of a level playing field. It gives the DHS control over the proceedings.

By refusing to join the Pablos' motion, the DHS effectively ended or closed the proceedings and won, having not been able to do so otherwise, when the adversarial nature of the proceedings was enforced, forcing the DHS to play fair by countering the Pablos' defense against deportation in real time, with real evidence. Once the BIA abdicated its rightful position as an impartial arbiter, giving in to the DHS Counsel's errors of logic and common sense, the DHS won.

That is not an adversarial system. That is not the design Congress imposed on deportation proceedings. *See Woodby*, 385 U.S. at 286.

CONCLUSION

The Supreme Court should grant the writ of *certiorari* and should reverse and vacate the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

Date: 10/31/2006

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APPENDIX

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Filed September 5, 2006
Decided September 22, 2006

Before

Hon. DANIEL A. MANION, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

No. 04-1070

SWEDENBORG PABLO and AMELIA PABLO,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney General of the United States,

Respondent.

Petition to Rehear Petition for Review of an Order of the Board of Immigration Appeals

Nos. A72-114-957 and A72-114-958

ORDER

On consideration of the petition for rehearing filed by counsel for the Petitioners on September 5, 2006, all members of the original panel have voted to **DENY** rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby, **DENIED**.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued October 19, 2005
Decided July 21, 2006

Before

Hon. DANIEL A. MANION, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

No. 04-1070

SWEDENBORG PABLO and AMELIA PABLO,
Petitioners,

v.

ALBERTO R. GONZALES, Attorney General of the United States,

Petition for Review of an Order of the Board of Immigration Appeals

Nos. A72-114-957 and A72-114-958

Respondent.

ORDER

Swedenborg and Amelia Pablo petition for review of the Board of Immigration Appeals' order denying their motion to reopen as untimely. The Pablos concede that their motion was filed more than 90 days after the Board's final decision, but they argue that their delay was justified because they did not receive notice of the Board's final decision. The Pablos also argue that they are not statutorily barred from adjusting their status, because exceptional circumstances excuse their failure to depart within the 30-day voluntary departure period. We conclude that the Board acted within the bounds of its discretion, and we therefore deny the petition for review.

I

The Pablos, husband and wife, are Philippine nationals. Once placed in immigration proceedings, they conceded removability, but they sought asylum and withholding of removal based on Swedenborg's fear of persecution by the police because of his opposition to the Philippine government. He based this claim primarily on one particular incident, when he was shot by the police at a rally he had helped to organize to protest the eviction of indigent squatters from Pasay City. He discovered afterwards, through a newspaper article, that the police were searching for him, because they believed that he had instigated the violence. An immigration judge denied the Pablos' application for relief in

August 1998, and they appealed to the Board. While their appeal was pending, they moved in December 1999 from their home at 313 Stratford Circle, Streamwood, Illinois, to a new residence at 1436 N. Greenmeadows Blvd., also in Streamwood. Neither the Pablos nor their counsel at the time, Alexander Vrbanoff, informed the Board of this change of address.

Evidently this was not Vrbanoff's only dereliction of duty: the Supreme Court of Illinois suspended him from practicing law in March 2001, and he filed a motion with the Board asking permission to withdraw from all of his pending cases. Before granting the motion, the Board required him to provide current addresses for all of his clients with pending appeals. Vrbanoff incorrectly provided the Board with the Pablos' former address. So informed, the Board used the old address when, on December 4, 2002, it mailed its decision to the Pablos affirming the IJ's decision and granting them voluntary departure within 30 days. The Pablos assert that they never received the Board's decision.

Vrbanoff was reinstated to practice in 2003, at which point he resumed his representation of the Pablos. On March 27, 2003, believing that their appeal was still pending before the Board, Vrbanoff moved the Board to remand the proceedings so that they could adjust their status based on an approved third-preference permanent resident visa. The Board treated this filing as a motion to reopen and denied it as untimely, because it was filed more than 90 days

after the Board had issued its final decision. See 8 C.F.R. § 1003.2(c)(2).

Upon receiving this denial and learning that the Board had issued its final decision in December 2002, Vrbanoff filed a second motion to reopen on behalf of the Pablos, in which he informed the Board that the Pablos had never received notice of the decision. Had they been notified, they argued, they "would have filed any necessary motions or appellate documents prior to being time barred." They supported the second motion only with a copy of the client address list that Vrbanoff had given the Board when he withdrew from his pending cases. Later, the Pablos filed a "Supplement to Motion to Re-open by Board Certification," in which they argued that changed conditions in the Philippines warranted reopening. They supported the latter claim with an assertion that their son, who attended university in the Philippines, had "received several oral and written death threats from individuals claiming to be associated with the New People's Army . . . a communist insurgent group that the Philippine Government is unable to control." To corroborate their story, they provided a police report filed by their son in July 2003, stating that family members of the New People's Army physically attacked him in May 2003 and began threatening his life in July 2003.

The Board denied the second motion to reopen. It noted that its final decision was sent to the address that Vrbanoff had submitted and that "no evidence, such as an affidavit,

[had] been submitted to support the argument that the Board's decision was not received." In addition, the Board found that the Pablos were barred from adjusting their status because they had failed to depart within the permitted period for voluntary departure, and they had presented no evidence that their failure to do so was caused by exceptional circumstances. Finally, the Board determined that the Pablos had failed to explain how their son's police report demonstrated changed conditions that would warrant reopening of their case. The Pablos have petitioned for review from the Board's two decisions refusing to reopen their case.

II

The Pablos' first argument on appeal appears to rely on the notion of equitable tolling. Because they never received notice of the Board's final decision of December 2002, the 90-day period in which to file a motion to reopen was never triggered, in their view. Moreover, they continue, the Board should have known that they never received the final decision, because the administrative record contains an envelope, bearing a postmark of the date of the Board's decision, that was returned to the Board as undeliverable. Under the circumstances, they claim, they should be excused from complying with the ordinary deadlines.

We review the Board's decision to deny a motion to reopen under the deferential abuse of discretion standard. *Patel v. Gonzales,* 442 F.3d 1011, 1016 (7th Cir. 2006). Time limits for

motions to reopen are properly characterized as procedural in nature, not jurisdictional, and thus they are in principle subject to equitable tolling. See *Patel*, 442 F.3d at 1016. See also *Chen v. Gonzales*, 437 F.3d 267, 269 (2d Cir. 2006); *Ray v. Gonzales*, 439 F.3d 582, 589 (9th Cir. 2006); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005) (180-day time limit for motions to reopen *in absentia* removal proceedings); *Harchenko v. INS*, 379 F.3d 405, 409-10 (6th Cir. 2004); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002). Equitable tolling is warranted when the noncitizen could not have been expected to file his or her claim earlier. *Patel*, 442 F.3d at 1016; *Pervaiz*, 405 F.3d at 490.

The Pablos have not presented a convincing reason to find that their lateness should be excused. A noncitizen with an appeal pending before the Board has an affirmative duty to provide the Board with written notice of a change of address within five working days. 8 C.F.R. § 1003.38(e). Although the Pablos were represented by counsel, "[l]awyers' errors in civil proceedings are imputed to their clients." *Ajose v. Gonzales*, 408 F.3d 393, 395 (7th Cir. 2005) (tardy motion to reopen not justified because counsel failed to inform the Board of his new mailing address). Not only did Vrbanoff fail to update the Pablos' address when they moved, but he provided the Board with an incorrect address for them 19 months later when he withdrew his representation. Although there is a narrow way in which persons in removal proceedings can attempt to show ineffective assistance of counsel, see *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), the Pablos have not attempted to meet

these requirements. Vrbanoff's errors must therefore be imputed to them.

The Pablos also argue, as we understand them, that their failure to depart voluntarily within the 30 days the Board allotted should be excused because of exceptional circumstances. Because they were subject to deportation prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act, their failure voluntarily to depart is analyzed under the voluntary departure statute in effect at that time. See IIRIRA, Pub. L. No. 104-208, § 309(c), 110 Stat. 3009-546, 625-627 (1996). Under the prior law, failure to comply with a voluntary departure order could be excused if "exceptional circumstances" prevented the noncitizen from leaving. See 8 U.S.C. § 1252b(c)(2)(A) (repealed 1996). The Pablos argue that the attacks and death threats against their son constituted exceptional circumstances. But the police reports that they submitted with the supplement to their motion to reopen show that the attacks and threats postdated the Board's decision. The attacks allegedly began in May 2003, well after the Board's final decision of December 4, 2002.

Finding no abuse of the Board's discretion in its evaluation of these arguments, we **DENY** the petition for review.

U.S. Department of Justice
Executive Office for Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A72 114 957 - Chicago
A72 114 958

Date: 12/11/03

In re: SWEDENBORG PABLO
AMELIA PABLO

IN DEPORTATION PROCEEDINGS

MOTION

FOR RESPONDENTS: Alexander C. Vrbanoff, Esquire

FOR DHS: Sylke Merchan
Assistant District Counsel

CHARGE: Notice: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - Entered without inspection (both respondents)

APPLICATION: Reopening; adjustment of status

This matter was last before the Board on May 5, 2003, at which time we denied the respondents' motion to reopen proceedings to apply for adjustment of status. In particular, we denied the motion because we found that the motion, filed on March 27, 2003, was untimely. The respondents, natives and citizens of the Philippines, have filed a second motion to reopen on July 1, 2003, urging that proceedings should be reopened by Board certification to allow them to pursue adjustment of status in light of the fact that the original motion, titled a motion to remand, was untimely because the respondents, who were acting *pro se* through no fault of their own, did not receive a copy of the Board's decision entered on December 4, 2002, dismissing their appeal. In a supplemental statement, received on July 10, 2003, the respondents indicate that additional special circumstances, in the form of difficulties their son has recently experienced while attending college in the Philippines, should be considered in reopening the proceedings. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes the motion. The motion will be denied.

The respondents argue that there are two separate bases for granting their motion to reopen. The regulations provide that motions to reopen generally shall be limited to one motion to reopen, and the motion must be filed no later than 90 days after the date on which the Board decision was rendered. *See* 8 C.F.R. § 1003.2(c)(2). While respondents do not argue that this motion is timely or that it is not number barred, they urge that we reopen these proceedings by Board certification. *See* 8

C.F.R. § 1003.1(c). The respondents urge that the first motion was untimely only because they did not receive the Board's December 4, 2002, order dismissing their appeal. However, not only has no evidence, such as an affidavit, been submitted to support the argument that the Board decision was not received, but the record shows that decision was sent to the respondents' address of record at the time the decision was made, an address provided in July 2001 correspondence received from the attorney currently representing the respondents.

We also find that, in any event, the respondents cannot establish their eligibility for adjustment of status because they have failed to depart within the granted voluntary departure period. By our December 4, 2002, decision, the respondents were granted 30 days within which to voluntarily depart from the United States. They filed motions to reopen on March 27, 2003, and on July 1, 2003, and apparently have remained beyond the 30-day voluntary departure period. An alien in deportation proceedings who has been "allowed to depart voluntarily under section 244(a)(1) ... who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the scheduled date of departure." Section 242B(e)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(e)(2). Adjustment of status under section 245 of the Act is one of the forms of relief included in paragraph (5). This Board has found that an alien who has filed a motion to reopen during

the pendency of a voluntary departure period in order to apply for relief from deportation and who subsequently remains in the United States after the scheduled date of departure, despite notice of the consequences of a failure to depart, is ineligible for those specified forms of relief. *See Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), *aff'd, Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998).

The respondents in this case were provided with written notice of the consequences of a failure to depart in the Immigration Judge's Memorandum of Oral Decision dated August 10, 1998, including ineligibility for adjustment of status. The Board's December 4, 2002, decision merely reinstates the Immigration Judge's grant of voluntary departure after the respondents' appeal tolled the voluntary departure period. *See Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977). Nor have the respondents presented any evidence with their motion demonstrating that their failure to depart was due to exceptional circumstances. Thus, given that the respondents have failed to voluntarily depart the United States within the authorized voluntary departure period, they are no longer eligible for adjustment of status under section 245 of the Act. Authority to extend the period of voluntary departure after it has been granted by either the immigration judge or the Boar is only within the jurisdiction of the DHS. 8 C.F.R. § 1240.26(f). The current record contains no evidence that the respondent's voluntary departure period has been extended by the DHS, and although we are sympathetic to the respondents' plight, we are without authority to provide a

remedy. Accordingly, the motion to reopen by Board certification will be denied.

Although the second motion to reopen is otherwise both untimely and number-barred, if the motion it to apply for asylum and withholding "based on changed country conditions arising in the country of nationality ... if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding," there is no time limit and the alien may file one such motion under this section. Section 240(c)(6)(C)(ii) of the Act, 8 U.S.C. § 1229a(c)(6)(C)(ii). Along with their July 10, 2003, supplement to their motion to reopen, the respondents submit a copy of a police report from Balanga City Police Station. The report indicated that their son had reported a physical altercation he had with another student. This was followed, more than a month later, by threats from an unidentified group of individuals. In one of the written threats, the sender indicated that his own father was a member of the New Peoples Army. The respondents do not state in in their motion how this evidence demonstrates that particular changes occurred since the time of their August 1998 hearing so as to create a new foundation for an asylum claim. Interpreting their motion most generously, the respondents wish to present new evidence relating to the continued violence involving the New Peoples Army, a problem they had addressed in pursuing the original claim. This is insufficient to bring the motion within the time-limit and number-limit exception. The mere fact that respondents wish

to present updated information regarding country conditions to reinforce the original claim does not allow them to circumvent the time and number limitations on motions to reopen when the evidence is used to support the previous claim, not to establish changed country conditions. Consequently, we cannot find that the new evidence submitted by the respondents reflects "changed circumstances" such that reopening is warranted in this case.

Accordingly, the motion will be denied.

ORDER: The motion is denied.

/s/ Frederick D. Hess
FOR THE BOARD

U.S. Department of Justice
Executive Office for Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A72 114 957 - Chicago Date: 05/05/03

In re: SWEDENBORG PABLO

IN DEPORTATION PROCEEDINGS

MOTION

FOR RESPONDENTS: Alexander C. Vrbanoff, Esquire

ORDER:

PER CURIAM. The motion to reopen has been filed out of time and will be denied. The final order in these proceedings was entered by the Board on December 4, 2002. Pursuant to 8 C.F.R. § 1003.2(c)(2) a motion to reopen previously the subject of a final decision by the Board must be filed no later than 90 days of the date of that decision. In this case, a motion to reopen would have been due on or before March 4, 2003. The record reflects, however, that the motion was not received until March 27, 2003. The motion to reopen was therefore filed out of time.

As the new regulations recently restate at 66 FR 46697, 46701 (September 7, 2001), motions to reopen are governed by the Department of Justice's current rules regarding motions to reopen, 8 C.F.R. § 1003.23 (before the Immigration Judge) and 1003.2 (before the Board of Immigration Appeals), which contain time and numerical limitations on the filing of such motions. *See* 8 C.F.R. §§ 1003.23(b)(1) and 1003.2(c)(2). The rules, however, do provide for limited exceptions to these time and limitations, among which is a motion to reopen filed jointly by the alien and the Service counsel in the case. Consequently, in order for the respondent to obtain reopening of these proceedings, he should contact the Service and seek its agreement to join a motion to reopen.

Accordingly, the motion will be denied.

/s/ Edward R. Grant
FOR THE BOARD

U.S. Department of Justice
Executive Office for Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A72 114 957 - Chicago Date: 12/05/02

In re: SWEDENBORG PABLO

IN DEPORTATION PROCEEDINGS

APPEAL

FOR RESPONDENTS: Pro se

FOR SERVICE: Sylke Merchan
Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the alien is permitted

to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director, and in the event of failure to depart, the alien shall be deported as provided by the Immigration Judge's order.

/s/ Roger A. Pauley
FOR THE BOARD

U.S. DEPARTMENT OF HOMELAND SECURITY

Office of the District Counsel
55 East Monroe Suite 1700

Chicago, Illinois 60603

Chicago District Office

June 23, 2003

Alexander Vrbanoff
641 West Lake Street, Suite 400
Chicago, Illinois 60661

Re: Joint Motion to Reopen, Joint Motion to Reopen, Swedenborg and Amelia Pablo A72-114-957, A72-114-958.

Dear Mr. Vrbanoff:

I have reviewed your proposed joint motion, your arguments and evidence contained therein and your clients' files. The Board of Immigration Appeals granted your clients voluntary departure. Failure to depart renders your clients statutorily ineligible for certain forms of relief including adjustment of status. I understand you assert that your clients did not receive the decisions. However, absent evidence that your clients did

not receive the decision by the Board of Immigration Appeals (no less than the returned envelope) I must assume the decisions were delivered."

Because your clients are statutorily ineligible for adjustment of status, I decline to join in your motion to reopen.

Cordially,

/s/ W. Douglas Craig

W. Douglas Craig
Deputy District Counsel

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Clerk
Board of Immigration Appeals
P.O. Box 8530
Falls Church, Virginia 22041

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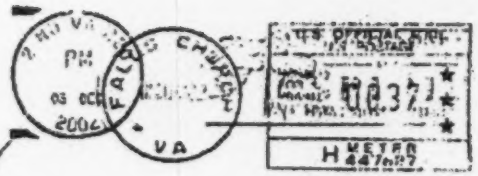

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App. 20